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1957

# Walter W. Cook v. Joseph M. Tracy : Brief of Respondent

Utah Supreme Court

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E. R. Callister; Robert B. Porter; Attorneys for Respondent;

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# In the Supreme Court of the State of Utah

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IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF ALL WATER, BOTH SURFACE AND UNDERGROUND, IN THE ESCALANTE VALLEY DRAINAGE AREA,

In Re: Water User's Claim No. 483,  
Underground Water Claim No. 7664,  
Walter W. Cook, Claimant.

WALTER W. COOK,  
*Plaintiff and Appellant,*

vs.

JOSEPH M. TRACY, State Engineer  
of the State of Utah.  
*Defendant and Respondent.*

FILED

APR 20 1957

Clerk, Supreme Court, Utah

Case No.  
8625

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## RESPONDENT'S BRIEF

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Attorney General,  
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Assistant Attorney General,  
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JOSEPH M. TRACY, State Engineer  
of the State of Utah.  
*Defendant and Respondent.*

---

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

The State Engineer of the State of Utah, as the respondent herein, is in complete agreement with the statement of the case and the statement of facts as set forth in the brief of appellant with respect to the issues here involved.

However, at the risk of repetition, we feel that we must make a similar statement to the one contained in the brief we filed in the case of *Goodwin v. Tracy*, which case was also an interlocutory appeal within this same general determination proceeding and which case has recently been decided by this Court. In that brief, we remarked that the respondent State Engineer had no personal or individual interest in the subject matter and was the respondent solely because of his official position; and that same statement is equally true here. Also, we should again state that, if a surface stream were under consideration here, we are confident that a number of other users would be allied with us in our defense; but the water source here is a large underground water basin and the other individual users from this basin do not appear able to realize that every diversion from this basin has some effect upon the water that will be available to them now and in the future. It becomes necessary, therefore, that the State Engineer undertake the defense of a matter such as is here presented.

The appellant, at page 16 of his brief, argues that the question now before the Court has become moot, except for those cases where the State Engineer did disallow a claim in this adjudication for the same reasons as in the case at bar; and counsel is undoubtedly correct in this assertion. However, in an area as highly developed as this Milford underground water area, any further increase in the use of water should be viewed with some alarm; and the Court should not view this matter as entirely un consequential. And it is neither fair nor proper to say that this case may not have other effects as no one is sufficiently a prophet to make such a prediction.

## STATEMENT OF POINTS

## POINT I

THAT SECTION 73-1-4, UTAH CODE ANNOTATED, 1953, FORMERLY SECTION 100-1-4, REVISED STATUTES OF UTAH, 1933, PROVIDING THAT NON-USE OF WATER FOR A CONSECUTIVE FIVE YEAR PERIOD CAUSES A REVERSION OF THAT WATER TO THE PUBLIC, HAS ALWAYS BEEN EQUALLY APPLICABLE TO UNDERGROUND WATER AS TO SURFACE WATER; AND THAT THE ACTION OF THE STATE ENGINEER IN DISALLOWING CLAIM NO. 483, ON THE GROUNDS THAT THERE HAD BEEN FIVE YEARS CONTINUOUS NON-USE DURING THE YEARS 1930, 1931, 1932, 1933 AND 1934, WAS PROPER AND THE DECISION OF THE DISTRICT COURT AFFIRMING THE ACTION OF THE STATE ENGINEER SHOULD BE UPHELD.

## ARGUMENT

## POINT I

THAT SECTION 73-1-4, UTAH CODE ANNOTATED, 1953, FORMERLY SECTION 100-1-4, REVISED STATUTES OF UTAH, 1933, PROVIDING THAT NON-USE OF WATER FOR A CONSECUTIVE FIVE YEAR PERIOD CAUSES A REVERSION OF THAT WATER TO THE PUBLIC, HAS ALWAYS BEEN EQUALLY AP-

PLICABLE TO UNDERGROUND WATER AS TO SURFACE WATER; AND THAT THE ACTION OF THE STATE ENGINEER IN DISALLOWING CLAIM NO. 483, ON THE GROUNDS THAT THERE HAD BEEN FIVE YEARS CONTINUOUS NON-USE DURING THE YEARS 1930, 1931, 1932, 1933 AND 1934, WAS PROPER AND THE DECISION OF THE DISTRICT COURT AFFIRMING THE ACTION OF THE STATE ENGINEER SHOULD BE UPHELD.

We differ with appellant's counsel not only upon the principle of law to be here applied but also as to the approach to the question. Appellant urges upon this Court and devotes a considerable portion of his brief to the proposition that underground water was not *considered* subject to the provisions of the statutes applicable to non-use and also to the proposition that there was no legislative intent, when the 1935 underground water law was enacted, to apply non-use to underground water. We do not believe that these propositions are either material or pertinent to the problem before the Court as we shall hereafter demonstrate.

It is our position and we urge upon the Court that all of the waters of this state have always been subject to the doctrine of appropriation. *Wrathall v. Johnson*, 86 Utah 50, 40 P. 2d 755. *Justesen v. Olsen*, 86 Utah 158, 40 P. 2d 802. As a corollary to that statement, the waters of this state have at all times been subject to the provision of the law that beneficial use is the basis, the measure and the

limit of all rights to its use. And non-use is not beneficial use.

The statutes dealing with reversion to the state for failure to use have been a part of our water code since its enactment and, as a matter of fact, existed even before the statute that was enacted in 1903 creating the office of State Engineer. The problem before the Court is not one of legislative intent nor one of what the public generally considered; but it is a question concerning one of the basic formulas in our policy with respect to water and its use. And that policy has from the beginning been to make and secure the greatest possible use and benefit from every drop of water.

From the beginning we have recognized that no one person or group of persons could acquire or hold a right to the use of water unless that water were being put to a beneficial use. At first we said that it would take seven years of failure to use before the right was lost; later, and as demands for the use of water became greater and more numerous, that period was reduced to five years. But always there has been with us the policy that the water must be used and must not be permitted to run to waste.

Water rights are treated in some instances as though they were in the nature of real property rights, but the distinction between them is clearly revealed when they are considered in the present context. Real property, or land as is might better be called here, is stable and remains in a fixed and permanent position and, as long as the owner complies with the rules laid down by the state and pays his taxes, his ownership continues and may not be taken



from him. Water is fluid and it is not the same water from year to year and its availability for use will vary from year to year and from season to season within the year; and its fugitive nature require that it be captured and put to a beneficial use or it will run to waste. We again answer the question that there is no beneficial use where the water is not used.

Following the decision by this Court in the *Wrathall* and *Justesen* cases, *supra*, wherein it was declared that all of the waters of this state had from the beginning been subject to the doctrine and the laws of appropriation, this Court has had a further opportunity to examine and to refine and to develop and to enunciate the rules that are applicable to underground waters, in the cases of *Hanson v. Salt Lake City*, 115 Utah 404, 205 P. 2d 255, and *Fairfield Irrigation Company v. Carson*, (Utah) 247 P. 2d 1004. We have carefully read and reviewed those cases and most emphatically say to this Court that the language therein clearly and concisely leads to the conclusions we are now urging upon the Court.

In the *Hanson* case, *supra*, the Court discusses at length the question of appropriation both before and after the decision of this Court in *Wrathall* and *Justesen* cases and holds that actual diversion and use of underground water prior to the enactment of the 1935 ground water code was sufficient to establish a right, and, in connection with that ruling the Court said:

“In 1935 the cases of *Wrathall v. Johnson*, *supra*, and *Justesen v. Olsen*, *supra*, held that the law of appropriation applies to the waters of subterranean and artesian basins.”

In the *Fairfield* case, *supra*, this Court again considered the change in concept as to underground water and said:

"Under the second proposition, we must determine the rights of the parties to the use of these well waters under the changed concept that they are public waters and subject to appropriation. Since the effective date of S. L. 1903, c. 100, Sec. 34, it is established that the right to the use of the unappropriated flowing streams of this state cannot be acquired without first filing an application therefor in the State Engineer's office \* \* \* In the *Hanson* case, *supra*, we discussed this question at length and recognized an exception to the above rule where, as in that case, \* \* \* 'the right to the use of underground waters which prior to the *Wrathall* case were not considered the subject of an appropriation, but which were therein held to be subject thereto, could be acquired prior to the 1935 amendments \* \* \* by merely diverting such waters from their natural source and placing them to a beneficial use. \* \* \*' The reason for this exception was said to prevent hardship and injustice to underground water users who were misled into not filing such an application because no provision was made by the statute therefor, and neither the legislature, the courts, the Engineer's Office, the Bar nor the general public prior to 1935 intended to require such an application in artesian well cases."

We maintain that the above statement clearly shows that this Court recognized that only the appropriation part of the statute was not applicable before 1935, and the following statement from this same *Fairfield* case affirms this contention:

"The Sunshine Water Line Company acquired the right to the use of these well waters in 1900 by

drilling the wells and beneficially using the waters but lost that right by abandonment and also by non-use from 1905 to 1912 under S. L. 1903, c. 100, sec. 50, before Thomas purchased the 1.90 acres from the county in 1913."

We urge upon this Court that the legislative enactment in 1935 of the underground water code and the exception there made that wells and other ground water rights would not be subject to the non-use statute clearly shows that the legislature thought that the non-use statute had and did apply to underground water.

And finally it may be noted that Chapter 20, Section 9, Laws of Utah 1880, provided:

"A continuous neglect to keep in repair any means of diverting, or conveying, water, or a continuous failure to use any right to water, for a period of seven years at any time after the passage of this act, shall be held to be an abandonment and forfeiture of said right."

That our legislature adopted a non-use statute 23 years before the office of the State Engineer was established and the application method of appropriation provided for clearly indicates that such a provision is a part of our basic concepts as to water and its use.

## CONCLUSION

In conclusion may we reiterate that we are not asking that the 1935 enactments as to underground water be applied retroactively, and that we are not seeking to determine legislative intent nor what the public generally considered to be the law. None of those things are material or relevant to the issues here presented. Rather we urge upon this Court that, as a basic concept in our water code, failure to use water for the statutory period of time is a violation of our doctrine of appropriation and of beneficial use and causes a reversion of that water to the public. This has always been true and neither the amendments by the 1935 legislature nor the attitude of some of the public can change or alter this basic truth. We earnestly commend to this Court that the trial court's judgment was proper and should be affirmed.

Respectfully submitted,

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ROBERT B. PORTER,  
Assistant Attorney General,

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